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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.D. et al., Persons Coming Under
the Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.D.,

Defendant and Appellant.

E047267

(Super.Ct.Nos. J218183 &
J218184)

OPINION

APPEAL from the Superior Court of San Bernardino County. A. Rex Victor,
Judge. Affirmed.

Melanie Waltz, under appointment by the Court of Appeal, for Defendant and
Appellant.

Ruth E. Stringer, County Counsel, and Danielle E. Wuchenich, Deputy County
Counsel, for Plaintiff and Respondent.

Linda Rehm, under appointment by the Court of Appeal, for Minors.

1. Introduction¹

J.D.² (father) appeals from a judgment terminating parental rights to two children, M.D. (born 2005) and C.D. (born 2003). He argues there was not sufficient evidence that C.D. was adoptable (§ 366.26, subd. (c)(1)) and the sibling-bond exception (§ 366.26, subd. (c)(1)(B)(v)) to parental termination should apply. We reject these contentions and affirm the judgment.

2. Factual and Procedural Background

In November 2007, the family came to the attention of San Bernardino Children and Family Services (CFS) when mother was reported panhandling, while accompanied by an older daughter, T.S.F.³ The police found the family living in an uninhabitable motel room in Redlands. The family had begun living in the motel in June 2007. The parents were jobless and mother was supporting the family by panhandling. The parents denied any current drug use but they displayed symptoms of drug use and, in April 2007, they had reported smoking marijuana several times a week. Mother also identified herself as being bipolar. CFS removed the children to a temporary foster placement. Both parents were incarcerated.

¹ All statutory references are to the Welfare and Institutions Code.

² Although we use initials as recommended by the Reporter of Decisions, instead of first name and last initial as provided in California Rules of Court, rule 8.400(b)(2), we agree with footnote one in *In re Edward S.* (2009) 173 Cal.App.4th 387, 392, fn. 1 criticizing this recently-adopted practice.

³ T.S.F. has a different father than the two younger children.

CFS filed an original dependency petition alleging the parents' failure to protect because of substance abuse, mental health issues, and unsuitable housing. The court ordered the children detained.

The parents had previously received family services when they were living in Oregon between December 2004 and October 2005. Their participation was described as sporadic. Mother was convicted of theft and forgery in Portland in 2004. She still owed restitution of \$4,000 and was on probation. Mother admitted a long history of methamphetamine use. Neither parent had submitted to drug testing. The parents often smoked marijuana in their motel room, exposing the children to second-hand smoke. Mother's older daughter, who was seven years old, had never been enrolled in school.

Father's driver's license had been suspended for convictions of driving under the influence in 2002 and 2003. Father has been jailed for not paying child support. Father also had a long history of drug use. The family was not receiving public assistance because of father's failure to comply with certain program requirements. Father's ability to work was restricted by injuries suffered to his knee, back, and pelvis. He had completed a GED and was recently employed at a Redlands food bank.

At the jurisdictional/dispositional hearing in December 2007, the court declared the children dependents and ordered reunification services and supervised visitation for the parents. After the detention, father skipped visitations with his children because he felt uncomfortable.

In April 2008, the children were moved to a different foster family because C.D. was displaying hyperactivity and other negative behaviors.

In the status review report dated June 2008, CFS stated mother was working at a local golf club but she did not feel able to care for the children. She was amenable to an open adoption. Mother had a positive drug test for methamphetamine in April 2008. Father had ceased contact with CFS in January 2008 and his whereabouts were unknown. The children were in the same foster home. C.D. had initially displayed some behavioral problems that seemed to have been resolved. The foster mother was considering adoption of all three children.

Neither parent appeared at the contested six-month status review hearing in July 2008. The court terminated reunification services and set a section 366.26 hearing.

In September 2008, CFS reported the children were “thriving” in their foster placement. Father was still missing. Mother still supported an open adoption.

CFS recommended termination of reunification services with the goal of adoption. Neither parent attended a notice review hearing on September 2, 2008.

In October 2008, at a nonappearance review hearing, the court received the following information from CFS. The foster mother reported that C.D. had been doing well in school until mother made contact with him again and he started behaving so poorly the school asked that he be removed. The foster mother described how C.D. was resisting discipline, acting defiantly, and refusing to eat properly. He lied about stealing another child’s toy, gum, and some candy. He cried and pulled on his hair. He hit M.D. Otherwise, the children were generally adjusting well in foster care. The foster mother reported they occasionally “space out” and discussed what they had witnessed at the motel: domestic violence, drug use, and prostitution.

On October 10, 2008, after having been missing for nine months, father contacted CFS offices. He explained he had been living on the streets and then entered a rehabilitation facility. He was now in a sober-living residence at Set Free Ministries and his goal was to enter the ministry. He wanted to reunite with the children.

In the adoption assessment, CFS reported that the children and their half-sister were appropriate to be adopted by the foster mother. C.D. was sometimes frustrated and unfocused. He had tantrums and would become angry, lashing out, pulling his hair, and throwing himself on the floor. The girls had some behavioral issues that were not as serious and were generally more well-adjusted. All of the children were attached to their foster mother and considered her to be “mom.” The sibling bond was strong and “crucial to their emotional health.” In October 2008, mother had asked to resume visitation which had not occurred since July. T.S.F. and C.D. expressed positive views about adoption. M.D. was too young to state her opinion.

The foster mother expressed her wish to adopt the children. She has previously adopted her niece, now 17, and she has one 11-year-old son. The foster mother lives in a comfortable home and earns \$50,000 to \$60,000 a year running a licensed in-home day care center and working at a group home for girls. She was sensitive to the issue that she and the children are of different races.

The contested section 366.26 hearing occurred in December 2008. The social worker testified father had visited the children once in November. The visit was friendly but the children did not display a strong attachment to father. The foster mother commented that M.D. missed father. The children were attached to the foster mother and

she considered it would be detrimental to separate them.

The social worker testified that father had never explained why he deserted the children and he did not provide any evidence of participating in rehabilitation programs.

The social worker also testified that it was in the children's best interests to be adopted, notwithstanding they may have missed their father. The children's stable, loving placement was a benefit outweighing father's parental rights.

Father testified that when he visited the children he played with them and received a father's day card. He had previously used methamphetamine, marijuana, and alcohol. He claimed he stopped using drugs and alcohol in January 2008. He had begun a sober-living program in June 2008. He had not acted as a parent for a year. But he believed C.D. and M.D. had missed him and call him "Daddy." He agreed the three children should be kept together.

The foster mother testified that both C.D. and M.D. had asked about father. M.D. made him a father's day card at school. She believed the children should not be separated. Although C.D. had setbacks, the children had all improved. She loved the three children and wanted to adopt them.

The court found it was in the children's best interest to be freed for adoption and terminated the parental rights. Father appeals.

3. Discussion

Father argues C.D. is not adoptable, supporting by implication his other argument that the sibling-bond exception should apply. If the girls are adoptable and C.D. is not, the siblings would have to be separated for the girls to be adopted.

On the question of C.D.'s adoptability, we conclude there is substantial evidence to support the trial court's finding that he is adoptable: "In making this determination, we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact." (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.)

Father argues that C.D.'s negative behaviors means he is not *generally* adoptable although father acknowledges the foster mother wants to adopt all the children. A prospective adoptive parent's willingness to adopt a child indicates a minor is likely to be adopted by someone. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 510.)

In the present case, C.D. is a lively and intelligent little boy but also somewhat troubled by the difficult circumstances of his childhood. In spite of his tantrums and problems in school, the foster mother believes he is improving rather than worsening. He loves his new "mom." She has shown no reluctance about adopting him and his sisters and she believes the children should remain together.

Furthermore, the suitability of the foster mother as an adoptive parent is not relevant to the issue of adoptability. (*In re David H.* (1995) 33 Cal.App.4th 368, 379.) The question of whether the foster mother has completed divorce proceedings is not pertinent to our analysis on appeal.

Based on the record, we have no difficulty concluding it "contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [C.D.] was likely to be adopted within a reasonable time." (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400.)

On the issue of the sibling exception, we agree father has waived the issue by not raising it below: “Allowing the father to raise the exception for the first time on appeal would be inconsistent with this court’s role of reviewing orders terminating parental rights for the sufficiency of the evidence. Therefore, the father has waived his right to raise the exception. [Citation.]” (*In re Erik P.*, *supra*, 104 Cal.App.4th at p. 403.)

Even if the issue had not been waived, it is not relevant because the adoptive mother wants to adopt all the siblings and therefore they are not at risk of being separated. The court may reject adoption under the sibling exception only if it finds adoption would be detrimental to the child whose welfare is being considered. (*In re Hector A.* (2005) 125 Cal.App.4th 783, 791.) In this case, no such likelihood of detriment exists. Everyone involved believes the children should stay together.

4. Disposition

We affirm the judgment.

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s/Gaut
Acting P.J.

We concur:

s/King
J.

s/Miller
J.